UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, in His Capacity as Court-Appointed Receiver for the Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities, Plaintiff, vs. ASSOCIATED BANK, N.A., Defendant.	Case No. 13-cv-00232 (DSD-JSM) David S. Doty, Sr. U.S. District Judge **FILED UNDER SEAL** **CONFIDENTIAL**

RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO STRIKE PORTIONS OF THE REPORT OF AND BAR TESTIMONY OF KARL JAREK

The Receiver moves this Court to strike portions of the report and related opinions of defendant Associated Bank, N.A.'s ("Associated Bank") damages expert, Karl Jarek, for several reasons. First, many of the opinions Mr. Jarek renders are not proper under Federal Rule of Evidence 702 because they are legal arguments. Not only are legal arguments improper subject matter for opinion testimony, but the legal arguments Mr. Jarek makes regarding the proper measure of damages in an aiding and abetting case such as this one are wrong under controlling law. Second, Mr. Jarek also provides his unqualified legal opinion that an expert is required to prove damages. This too is wrong as a matter of law. Finally, with respect to his mitigation analysis, Mr. Jarek's methodology is unsound and does not apply accepted methods for calculating mitigation. For all of these reasons, the Receiver's motion should be granted and portions of

Mr. Jarek's report containing the improper opinions should be stricken. (Jarek Report (attached as Exhibit 1 to the La Porte Declaration, which is filed concurrently with this Memorandum) ¶¶ 21, 25, 43-45, 71-72, 74, 96, 101-109, 119-20, 127, and 136).[1] Mr. Jarek should also be barred from rendering any such opinions either in support of summary judgment or at trial.

BACKGROUND

This is an action by the Court-appointed Receiver of the entities ("Receivership Entities") that were used to perpetrate a massive Ponzi scheme. Trevor Cook, Pat Kiley, Jason Bo Alan Beckman and others are currently serving lengthy jail sentences for their roles in the scheme. Many investor victims ended up losing most, if not all of their retirement savings. The total invested reached over $190 million over the course of the scheme. As it stands, investor victims have lost more than $150 million because of the wrongful acts of the schemers, their accomplices, and their aiders and abettors.

The Receiver seeks recovery from Associated Bank for its aiding and abetting various torts related to the scheme, including conversion and breach of fiduciary duty. The Eighth Circuit confirmed that the Complaint sets forth facts that, if true, are sufficient to establish liability on the part of Associated Bank. *See Zayed v. Associated Bank*, 779 F.3d 727 (8th Cir. 2015). Associated Bank, through the work of its officer bankers, created a number of bank accounts for the Receivership Entities. Many of these accounts were opened without proper supporting documentation, or with identifiably fraudulent

[1] Citations here are only to the paragraph numbers of Mr. Jarek's report. For the Court's convenience, however, the Receiver cites elsewhere to both the page number and paragraph number of that report.

[2] Because resolution of these fact issues is not necessary for purposes of this motion, the

supporting documentation. Associated Bank opened at least one account with the specific purpose and intent to violate bank policy concerning the opening of such accounts. Once opened, Associated Bank facilitated unauthorized wire transfers between these accounts and accounts held at other institutions. In other instances, they agreed to churn accounts via fraudulent wire activity to make it appear that the account balances were larger than they really were. These are but a few examples of Associated Bank's wrongful activity and involvement in the scheme.[2]

For claims of aiding and abetting torts in Minnesota, the aider and abettor is liable for the underlying damages caused by the primary tortfeasor. *See Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186-87 (Minn. 1999) ("[A]ll who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury.") (internal citation and quotation marks omitted). Damages to the Receivership Entities are properly measured by claims against the Receivership Entities by investor victims for the losses that they suffered as a result of the fraud, less the money they recovered either as lulling payments during the course of the Ponzi scheme or from the Receiver or other sources after the scheme was shut down.[3]

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[2] Because resolution of these fact issues is not necessary for purposes of this motion, the Receiver has not provided citation to the wealth of factual support for his claims. The evidence supporting those facts will be provided in response to Associated Bank's recently-filed motion for summary judgment. *See* ECF No. 177).

[3] As Scott Hlavacek, the SEC accountant who conducted a detailed analysis of the banking records of the Receivership Entities, testified, "how much they invested and how much they received back" represents the investor victims' losses. *See* Hlavacek Dep. at 143:9-10.

The Receiver has two alternative positions regarding the proper way that these damages are measured. The Receiver's first damages calculation is based on the total amount investor victims lost in the scheme that Associated Bank aided and abetted. The amount of these investor victim losses, as recognized and confirmed by the Court in the Third Amended Final Claims List, is $160,597,075.32.[4] *See Order Approving Sixth Interim Distribution and Third Amended Final Claims List, CFTC v. Cook et al.*, No. 09-cv-03332 MJD-FLN (D. Minn. Jan. 16, 2014) (ECF No. 1063).

The Receiver's alternative theory of the proper measure of damages is the difference between the amount of investor victim funds that were deposited into Associated Bank accounts held by the Receivership Entities ($89,045,352.01), and the funds that were returned to the investor victims during the scheme from those Associated Bank accounts ($25,363,705.14). That total is $63,681,646.87. The Receiver explained the process for determining the amount of investor victims' losses in great detail in filings to this Court as part of the Receivership duties, and more recently in written discovery.

On August 19, 2016, Associated Bank provided the written report of accountant and financial analyst, Karl Jarek. Mr. Jarek's report spanned forty pages not including exhibits. Thirty-three of those pages criticize the Receiver's methodology of calculating damages, and opining on various legal standards. Among the many other purported opinions contained in Mr. Jarek's report is his improper opinion that damages cannot be

[4] This amount is properly reduced – and will continue to be reduced – by any amounts recovered by the Receiver and returned to the investors after the date of the Third Amended Final Claims List.

calculated without the assistance of an expert witness. This motion challenges several of these improper opinions as explained below.

ARGUMENT

The admissibility of opinion testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.
> >
> > Fed. R. Evid. 702.

Opinion evidence under this rule "must be reliable or trustworthy in an evidentiary sense." *Id.*; *see also* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.02[3] (2001). Also, the requirement of "helpfulness" guarantees against admitting opinions, which, among other things, tell the fact-finder what outcome to reach. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). The Eighth Circuit has characterized the helpfulness requirement as a "basic rule of relevancy," which exists independently of other, so-called *Daubert* questions. *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008) (citations omitted).

Courts will exclude expert testimony that "merely states a legal conclusion, usurps the function of the jury in deciding facts, or interferes with the judge in instructing on the law. Such evidence is not helpful to the jury to understand the evidence or to determine a fact in issue." *Parker v. Wal-Mart Stores, Inc.*, 267 F.R.D. 373, 376 (D. Kan. 2010) (citations omitted). As the Eighth Circuit has stated, expert testimony is "helpful" to a jury "if it concerns matters beyond the knowledge of average individuals; however, it cannot supplant the jury's role in evaluating the evidence." *United States v. Shedlock*, 62 F.3d 214, 219 (8th Cir. 1995) (citing *United States v. French*, 12 F.3d 114, 116 (8th Cir. 1993)); *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 965 (D. Minn. 2009) (same); *Ritt v. Dingle*, 2001 U.S. Dist. LEXIS 15220, at *32 (D. Minn. Apr. 3, 2001) (same); *United States ex rel. Dyer v. Raytheon Co.*, 2013 U.S. Dist. LEXIS 135691, at *36 (D. Mass. Sep. 23, 2013) ("[Expert witness] Silverstone may not testify or opine on the issue of Raytheon's knowledge or intent."); *Holmes Grp., Inc. v. RPS Prods., Inc.*, 2010 U.S. Dist. LEXIS 102727, 2010 WL 7867756, *5 (D. Mass. June 25, 2010) ("An expert may not testify to another person's intent. No level of experience or expertise will make an expert witness a mind-reader."). Expert testimony is inadmissible if directed to matters that a lay jury is capable of understanding and deciding without the expert's help. *In Re Baycol Products Litig.*, 532 F. Supp. 2d 1029, 1067 (D. Minn. 2007).

I. Mr. Jarek Should Not Be Permitted to Opine On [redacted]

Mr. Jarek opines that [redacted] His report does

not make clear whether this is an opinion Mr. Jarek renders in his report, or whether it is an assumption he makes based on Associated Bank's representations to him. To the extent that it is the former, it is not an opinion that would be helpful to the jury. In fact, it would invade the province of the jury – namely, to determine the ultimate facts of the case. *See, e.g., United States v. French*, 12 F.3d 114, 116 (8th Cir. 1993) (citing *Bartak v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 530 (8th Cir. 1980)).

Moreover, Mr. Jarek is not qualified to opine on [redacted]

II. The Court Should Strike Numerous Parts of Mr. Jarek's Report Because He Impermissibly Opines on Legal Issues that Are for This Court to Decide, and Also Should Not Permit Him to Further Opine on These Issues

Many of Mr. Jarek's opinions are directed to legal questions [redacted] and not to factual issues (the calculation of those damages). The applicable measure of damages (as opposed to the calculation of damages under the appropriate legal standard) is a legal issue, and is not a fact question about which an expert may opine. *See Bingham v. Zolt*, 66 F.3d 553, 563 (2d Cir. 1995) ("[T]he measure of damages upon which the factual computation is based is a question of law . . . ."); *Garvin v. Acuity*, No. 3:11-cv-05105-BCW, 2012 WL 5197223,

at *3 (W.D. Mo. Oct. 19, 2012) ("The proper measure of damages is a question of law for determination by the Court, and the particular facts and circumstances of each case dictate which measure of damages is appropriate."). A damages expert may properly testify (as an expert) only as to what damages may be recoverable under the applicable legal measure of damages that the Court determines governs the claims. *See LinkCo, Inc. v. Fujitsu Ltd.*, No. 00 Civ. 7242 (SAS), 2002 WL 1585551, at *1 (S.D.N.Y. July 16, 2002) ("In our adversarial system, the judge instructs the jury on what the law is, and the jury then applies this law to the facts as it has determined them. Given this division of duties, an expert's role in this process is necessarily limited").

Moreover "[e]xpert opinions that are contrary to law are inadmissible." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (citations omitted). Such opinions "cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact." *Id.* Accordingly, damages expert testimony that "does not comport with a recognized measure of damages" is unreliable as a matter of law, and must be excluded. *Coquina Invs. v. Rothstein*, No. 10-60786-Civ-COOKE/BANDSTRA, 2011 WL 4949191, at *7 (S.D. Fla. Oct. 18, 2011).

Applying the standards articulated above, it is apparent that Mr. Jarek's opinion will not assist the trier of fact as to its fact-finding task to determine whether the elements of the various aiding and abetting torts the Receiver has asserted against Associated Bank have been established. Mr. Jarek's opinion would invade the province of this Court in determining the legal question as to the applicable measure of damages. *See*

LinkCo, 2002 WL 1585551, at *1 ("Every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law.") (citation omitted).[5]

[redacted]

Mr. Jarek should be barred under Rule 702 from providing any opinion that [redacted]

[redacted]

[5] [redacted] But courts can and often do consider opinions expressed anywhere in a written report. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n v. Comerica Bank*, No. 05-CV-0056, 2011 U.S. Dist. LEXIS 113662 at *7 (S.D. Ohio Oct. 3, 2011). The Receiver, therefore, addresses opinions contained in any portion of Mr. Jarek's report.

[redacted]

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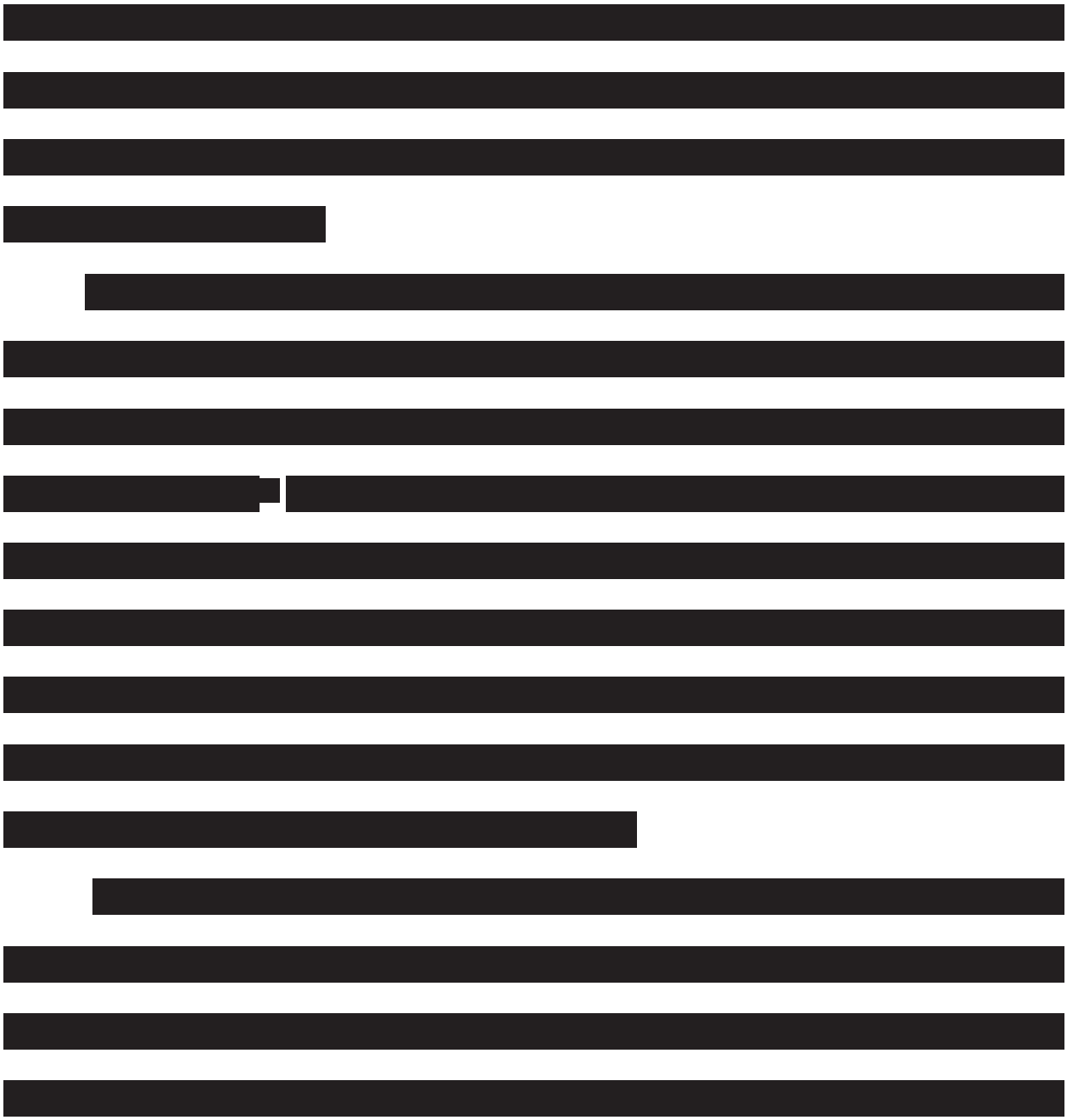

[redacted]

[redacted]

CONCLUSION

Mr. Jarek's expert report offers improper legal opinions in the guise of expert analysis. The above-described portions of the report that violate Rule 702 should be stricken [redacted], and the Court should exclude Mr. Jarek from testifying on any of these matters at summary judgment or at trial. In addition, the Court should also exclude the portions of Mr. Jarek's report that use inappropriate methodology [redacted] and should likewise exclude him from any subsequent testimony.

Dated: October 28, 2016

Respectfully submitted,

/s/Michael R. La Porte

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on October 28, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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